IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 41 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE N.G.NANDI Sd/-
and
Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

UNITED INDIA INSURANCE CO LTD

Versus

BARAIYA LILIBEN VITHALBHAI

Appearance:

1. First Appeal No. 41 of 1997
MR PV NANAVATI for Appellant.
None for Respondent No. 1
MR RM PARMAR for Respondent No. 2-4
MR JT TRIVEDI for Respondent No. 5-6

CORAM : MR.JUSTICE N.G.NANDI
and
MR.JUSTICE D.A.MEHTA

Date of decision:20/02/2003

CAV JUDGEMENT

(Per : MR.JUSTICE D.A.MEHTA)

1 This is an appeal filed by the appellant-Insurance Company u/s.173 of the Motor Vehicles Act,1988 (for short 'the Act') against the judgment and award dated 5.7.1996 passed by the Motor Accident Claims Tribunal (Main), Bhavnagar in Motor Accident Claim Petition No.354 of 1992.

2 On 28.4.1992 at around 4.00 p.m. the accident involving truck no.GTZ 949 took place on Talaja-Mahuva road, near Borda village. The said vehicle turned turtle resulting in death of one Vitthalbhai Laxmanbhai. The original claimants, respondent nos. 1 to 4 herein, filed the claim petition seeking compensation of Rs.3,20,000/-. After considering the evidence on record and hearing all the parties who appeared before the Claims Tribunal, an award of Rs.2,60,000/- with interest came to be made.

3. Mr.P.V.Nanavati, learned Advocate appearing on behalf of the appellant-Insurance Company submitted that the accident took place in 1992 i.e. before the amendment by the Amending Act of 1994, and hence, taking into consideration the provisions of Section 147 of the Act, as they then stood, the appellant Insurance Company was wrongly held to be liable by the Claims Tribunal alongwith the owner of the vehicle. It was submitted that the deceased was not travelling in the truck as a labourer, but was either a gratuitous passenger or simply an unauthorized passenger. It was further submitted that taking into consideration the deposition of the father of the deceased viz. Lakshmanbhai Jivabhai, respondent no.3 herein, at the most the deceased could be treated as a casual labourer who was not permanently employed and the accident took place when the deceased had travelled in the truck to Khodiyar temple for darshan and offering of 'Lapsi' to fulfill the vow of one Shri Ramsingbhai, who was a relative of the owner of the truck. Mr.Nanavati further submitted that even if for the sake of argument it was accepted that the deceased was a labourer, yet at the time of the accident, as the truck was not used for the purpose of its business viz. purpose of carting, the Insurance Company could not be held liable as the deceased was not travelling in the vehicle in the course of his employment. It was submitted that once the job of loading and unloading has been completed and the truck was thereafter plied for returning to the owner's place, and if during such a trip gratuitous or unauthorized passengers were carried it would be a distinct purpose

which was not permissible in law and the Insurance Company could not be fastened with the liability to pay compensation. Mr.Nanavati further submitted that the provisions of Section 147 of the Act did not recognise dual purpose and it was necessary for the claimants to prove that the death occurred or arose out of and in the course of the employment. In this context, Mr.Nanavati relied upon the decision of the Supreme Court in the case of New India Assurance Company Limited Vs. Asha Rani and others 2002(10) SC 162. It was further submitted that the claimants had failed to lead any evidence, oral or documentary, as to the nature of the user of the truck i.e. whether the truck was used for carting or not. Similarly, whether the deceased was a labourer or not, and even if he was a labourer, whether he was a labourer on this truck viz. GTZ 949 had not been proved by any documentary evidence and the Tribunal had committed an error in law in placing reliance upon deposition of the father of the deceased. That the aforesaid facts were within the personal knowledge of the owner of the vehicle viz. Koli Chitharbhai S., respondent no.6 herein, who had chosen not to appear in person or place any evidence on record and thus, the contention was, an inference should be drawn against the owner and the Insurance Company should be exonerated.

4 Mr.R.M.Parmar, appearing on behalf of the original claimants viz. respondent nos. 1 to 4 submitted that the occurrence of the accident was not disputed by the appellant; similarly the finding of the Tribunal regarding negligence of the driver of the truck was also not disputed and hence, if the appellant-Insurance Company wanted to show that the deceased was either not a labourer or that the truck was not used for the purpose of business, it was incumbent upon the Insurance Company to lead evidence in this regard, if necessary by examining either the driver and/or the owner of the vehicle. That, claimant no.3 had specifically stated in his deposition (exh.33) that the deceased was a labourer on the truck owned by respondent no.6 and was earning Rs.1500/- p.m.

5 Mr.J.T.Trivedi, learned Advocate appearing on behalf of respondent nos. 5 and 6, the driver and the owner of the vehicle (original opponents no. 1 & 2) submitted that the said respondents had filed their written statement and in light of the same they did not find it necessary to lead any further evidence. That it was open to either the claimants or the Insurance Company to lead evidence in support of their respective stands.

6 The decision in case of New India Assurance Co. Ltd. Vs. Asha Rani & Ors. (supra) deals with a situation wherein a Larger Bench was called upon to decide whether the insurer is liable to pay compensation to the dependents of the deceased passenger, while the deceased passenger was travelling in a goods vehicle and that vehicle met with an accident, on account of which the passenger died or suffered bodily injury. The decision deals with the category of cases which are covered by the Motor Vehicles Act,1988, prior to the amendment of 1994. It is laid down in the decision that prior to the amendment of 1994, the insurer was not required to insure against the owner of the goods or his authorised representative being carried in a goods vehicle. That in view of the changes in the provisions of the 1988 Act, vis-a-vis the 1939 Act, the meaning of the words "any person" must be attributed having regard to the context in which the said words have been used i.e. "a third party". That the provisions of the Act, do not cast any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods vehicle, and thus, if the owner had not paid additional premium the insurer would not be liable. That, Section 147(2) of the Act enables insurer to defend against a claim by a claimant and one of the defences is to the effect that the vehicle in question has been used for the purpose not allowed by the permit under which the vehicle was used.

7 The present case is admittedly not one which involves payment of compensation to the owner of goods or his authorised representative on being carried in a goods vehicle when that vehicle meets with an accident and the owner of goods or his representative expires or suffers any bodily injury. The limited question then which remains is, as to whether deceased viz. Vitthalbhai Lakshmanbhai was travelling as a labourer in truck No.GTZ 949 ? And if yes, whether the said truck was used for the purpose of business of carting at the time of the accident ? In our opinion, this question has to be answered in light of the facts and evidence on record, there being no legal dimension to the said question.

8 We have gone through the Record and Proceedings. Shri Lakshmanbhai Jivabhai has deposed at exhibit 33. He has very categorically stated that the deceased was a labourer in truck no.GTZ 949 owned by opponent no.2 i.e. respondent no.6 herein - Koli Chitharbhai S. It is further deposed that the deceased was a permanent labourer earning salary of Rs.1500/- p.m. In the cross-examination, the suggestion on behalf of the

appellant Insurance Company that deceased Vitthalbhai was travelling as an unauthorized passenger has been categorically denied. Similarly, the suggestion on behalf of the appellant Insurance Company that deceased was not employed permanently has also been specifically denied. Therefore, the factum of the deceased having been employed as a permanent labourer of truck no.GTZ 949 stands established in absence of any evidence to the contrary.

9 The second aspect of the controversy viz. whether the said truck was used for the purpose of business of carting or not, is an aspect in respect of which no evidence has been led by the contesting party. Though on behalf of the appellant-Insurance Company claimant Lakshmanbhai was cross-examined, there is no suggestion to the effect that the truck was not used for the purpose of business. It is in this context that the finding of the tribunal that the burden was on the Insurance Company to prove that the deceased was an unauthorised passenger and that the Insurance Company had failed to discharge the said burden, has to be appreciated. Once the evidence in the form of deposition of the father of the deceased, to the effect that the deceased was a labourer employed in the said truck, had come on record it was necessary for the appellantInsurance Company to not only disprove the said aspect but further prove that the vehicle in question was not used for the purpose allowed by the permit under which the vehicle was used. Mr.P.V.Nanavati made strenuous effort in support of his contention that the vehicle was not used for the purpose of carting business and as the owner had not stepped into the box an adverse inference in favour of the appellant Insurance Company should be drawn in this regard. We are afraid that in absence of any evidence having been led by the Insurance Company in this regard, it would not be open to this Court to draw such an adverse inference as Mr.Nanavati would like us to do. What was the permissible user as per the permit and in terms of the policy was within the knowledge of the Insurance Company and if the Insurance Company wanted to contest the claim on the basis of the same, it was for the Insurance Company to lead evidence in this regard. We find from the record and proceedings that apart from raising this ground in the written statement before the Claims Tribunal the Insurance Company has not taken any step in support of the averment made in the written statement. This was not a mere statement of denial in the written statement but a positive averment, and hence, the onus was on the person making such averment to lead evidence in proof of the

same. In absence of any such evidence the appellantInsurance Company cannot succeed. The claims Tribunal has, in our opinion, correctly appreciated the evidence on record to arrive at the finding that the Insurance Company has failed to lead any evidence in this regard.

10 In these circumstances, we do not find any infirmity in the judgment and award dated 5.7.1996 which would call for any interference in this appeal. Though various grounds as regards quantum of compensation awarded have been raised in the memorandum of appeal, on behalf of the appellant, the challenge to the judgment and award has been restricted to the capacity of the deceased and nature of user of the vehicle. Hence, we do not find it necessary to deal with any of the grounds in relation to quantum of compensation awarded.

11 In the result, the appeal being devoid of merits fails and is dismissed. There shall be no order as to costs.

Sd/- Sd/-
(N.G.Nandi, J) (D.A.Mehta, J)

m.m.bhatt